VIJAYALAKSHMI DEVI D/O NADCHATIRAM

v.

JEGADEVAN S/O NADCHATIRAM & 3 ORS.

COURT OF APPEAL, KUALA LUMPUR
DATO' ZAKARIA BIN MOHD YATIM JCA
DATO' N.H. CHAN JCA
DATO' MAHADEV SHANKAR JCA
[CIVIL APPEAL NO. N-02-1-94]
7 MARCH 1995

***COMPANY LAW** : Company ordered to be wound up - High Court granting stay - Appeal against decision - Supreme Court granting interim stay of High Court order pending appeal - Effect of a stay order on a winding-up - High Court subsequently hearing further application and making orders - Whether proper.*

On 5 September 1989, Nadchatiram Realities (1960) Sdn. Bhd. (the company) was ordered to be wound up on the application of the Inland Revenue Department and the official receiver was appointed liquidator. On an application by four contributories, including the first and second respondents, the High Court, on 22 March 1994, ordered that the order to wind up the company and all proceedings under it be stayed altogether.

The appellant appealed against the order of 22 March 1994 and the Supreme Court granted an interim stay of the High Court order pending appeal to the Federal Court.

Despite the order of 22 March 1994, the learned Judge, on 29 June 1994, entertained and heard an application by the first, second and third respondents and allowed the application. The appellant appealed.

Held:

[1] The effect of an order to stay proceedings under the winding-up order altogether after a winding-up order has been made is a total discontinuance or termination of the winding-up proceedings.

[2] The effect of the order of the then Supreme Court ordering a stay of the order of the High Court dated 22 March 1994 is that the order of the High Court of 22 March 1994 would not be operative from the date of the passing of the stay order of the then Supreme Court. It does not mean that the order of the High Court dated 22 March 1994 staying all further proceedings under the winding-up order dated 5 September 1989 has been wiped out from existence. The order of the High Court dated 22 March 1994 ordering an indefinite or permanent stay of the winding-up proceedings is still in existence although, for the time being, inoperative or suspended until the appeal is heard by the Federal Court.

[3] It is because the order dated 22 March 1994 still exists that the Judge ought not to have heard the application or to have made any order on it after that in proceedings under the winding-up order.

[4] If it were otherwise, so that the order dated 29 June 1994 were allowed to remain undisturbed and the order dated 22 March 1994 was affirmed by the Federal Court on appeal, it would have made the decision of the Federal Court nugatory as well as made nonsense of the order of the High Court dated 22 March 1994. This is because by affirming the order

dated 22 March 1994, the winding-up order and all proceedings under it would have been totally discontinued, and that would have made it impossible for the order dated 29 June 1994 to have been made under the discontinued proceedings.

[Appeal allowed. Order of High Court dated 29 June 1994 set aside].

[**Bahasa Malaysia** Translation of Headnote]

***UNDANG-UNDANG SYARIKAT**: Syarikat diperintah supaya digulung - Mahkamah Tinggi memberikan penggantungan - Rayuan terhadap keputusan - Mahkamah Agung memberikan penggantungan interim perintah Mahkamah Tinggi sementara menantikan rayuan - Kesan perintah penggantungan ke atas penggulungan - Mahkamah Tinggi kemudiannya mendengar permohonan yang selanjutnya dan membuat perintah-perintah - Samada wajar.*

Pada 5 September 1989, Nadchatiram Realities (1960) Sdn. Bhd. (syarikat tersebut) telah diperintahkan supaya digulung atas permohonan Jabatan Hasil Dalam Negeri dan pegawai penerima telah dilantik sebagai penyelesai. Atas permohonan oleh empat penyumbang, termasuk responden-responden pertama dan kedua, Mahkamah Tinggi telah pada 22 Mac 1994, memerintahkan supaya perintah untuk menggulung syarikat tersebut dan kesemua prosiding di bawahnya hendaklah digantung sama sekali.

Perayu telah merayu terhadap perintah bertarikh 22 Mac 1994 itu dan Mahkamah Agung telah memberikan satu penggantungan interim bagi perintah Mahkamah Tinggi itu sementara menantikan rayuan kepada Mahkamah Persekutuan.

Walaupun terdapat perintah bertarikh 22 Mac 1994, Tuan Hakim yang bijaksana, telah pada 29 Jun 1994, melayan dan mendengar satu permohonan oleh responden-responden pertama, kedua dan ketiga dan telah membenarkan permohonan tersebut. Perayu telah merayu.

Diputuskan:

[1] Kesan sesuatu perintah untuk menggantungkan prosiding-prosiding di bawah perintah penggulungan tersebut sama sekali setelah satu perintah penggulungan dibuat adalah suatu pemberhentian atau penamatan prosiding-prosiding penggulungan tersebut.

[2] Kesan perintah Mahkamah Agung ketika itu yang memerintahkan penggantungan perintah Mahkamah Tinggi bertarikh 22 Mac 1994 adalah bahawa perintah Mahkamah Tinggi bertarikh 22 Mac 1994 itu tidak akan berkuatkuasa daripada tarikh penetapan perintah penggantungan Mahkamah Agung ketika itu. Ianya tidak bermakna bahawa perintah bertarikh 22 Mac, 1994 yang menggantung kesemua prosiding-prosiding yang selanjutnya di bawah perintah penggulungan bertarikh 5 September 1989 telah dihapuskan daripada kewujudan. Perintah Mahkamah Tinggi bertarikh 22 Mac 1994 yang memerintahkan penggantungan kekal prosiding-prosiding penggulungan tersebut adalah masih wujud walaupun, untuk sementara waktu, tidak berkuatkuasa atau tergantung sehingga rayuan tersebut didengar oleh Mahkamah Persekutuan.

[3] Adalah kerana perintah bertarikh 22 Mac 1994 masih wujud bahawa Tuan Hakim tidak seharusnya mendengar permohonan tersebut atau pun membuat apa-apa perintah ke atasnya selepas itu dalam prosiding-prosiding di bawah perintah penggulungan tersebut.

[4] Jika ianya dalam keadaan yang sebaliknya, supaya perintah bertarikh 29 Jun 1994 dibenarkan untuk kekal tidak diganggu dan perintah bertarikh 22 Mac 1994 telah disahkan oleh Mahkamah Persekutuan atas rayuan, ianya akan menjadikan keputusan Mahkamah Persekutuan nugatori (tak berkesan) dan juga menjadikan perintah Mahkamah Tinggi bertarikh

22 Mac 1994 tidak bermakna. Ini adalah kerana dengan mengesahkan perintah bertarikh 22 Mac 1994, perintah penggulungan tersebut dan kesemua prosiding dibawahnya diberhentikan sepenuhnya, dan itu akan menjadikan mustahil bagi perintah bertarikh 29 Jun 1994 dibuat di bawah prosiding-prosiding yang telah diberhentikan itu.

[Rayuan dibenarkan. Perintah Mahkamah Tinggi bertarikh 29 Jun 1994 diketepikan].

Cases referred to:
Brinds Ltd v. Offshore Oil NL (No.2) [1985] 10 ACLR 242 ***(refd)***
Shree Chamundi Mopeds Ltd. v. Church of South India Trust Assn. [1992] 3 SCC 1, 9; AIR 1992 SC 1439, ***(foll)***
Re Baxters [1898] WN 60 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 243(1)
Companies Act 1948, s. 256(l) (UK)
Insolvency Act 1986, s. l47(l) (UK)
Companies Act 1961, s. 243(1) (Aust.)
Companies Act 1981, s. 383 (Aust.)
Corporations Act 1989, s. 482 (Aust.)

Other sources referred to:
Atkin's Court Forms (2nd Ed.), (1992 issue), Vol. 10 pp. 46, 384, 386
Palmer's Company Precedents (17th Ed.) Part II, p. 96
Supreme Court Practice (1993) Vol. 2, para. 5220 at p. 1618
Ford, Principles of Company Law, 5th Ed. (1990), [2207] at p. 770
Jowitt's Dictionary of English Law, (2nd Ed.), Vol. 2, pp. 1701, 1702
Supreme Court on Words and Phrases [1993], at p.659

For the appellant - Cecil Abraham and Satharuban Sivasubramaniam; M/s Satha & Co.
For the 1st, 2nd and 3rd respondents - N. Saraswathy Devi and R.S. Sodhi; M/s N. Saraswathy
For the Official Receiver & Liquidator - Noorin Badaruddin

JUDGMENT

N.H. Chan JCA:

On 5 September 1989, Nadchatiram Realities (1960) Sdn Bhd was ordered to be compulsorily wound up by the High Court in Seremban (Companies Winding Up No. 28-2-1988) on a creditor's petition by the Inland Revenue Department. The official receiver was appointed liquidator.

On 22 March 1994, on an application by four contributories of the company (the first and second respondents together with Dr Mahadevan s/o Nadchatiram and Danapakia Devi d/o Nadchatiram) to "discharge the winding-up order and/or stay all proceedings in relation to the winding-up altogether", the High Court had ordered that the order to wind up the company dated 5 September 1989 and all proceedings under it be stayed altogether.

Section 243(1) of the Companies Act 1965 reads:

> 243(1) At any time after an order for winding up has been made the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the Court thinks fit.

There are similar provisions in the United Kingdom: see s. 256(l) of the Companies Act 1948 and s. l47(l) of the Insolvency Act 1986, (see *Atkin's Court Forms* (2nd Ed.), (1992 issue), Vol. 10 p. 384, note 1, where it says:

> Until the Insolvency Rules 1986 ... came into force a winding-up order could not be rescinded after it had been drawn up. The only remedy was to apply for a stay: *Re Intermain Properties Ltd.* [1986] BCLC 265. The Insolvency Rules 1986 r. 7.47(1) provides that: 'every Court having jurisdiction under the Act to wind up companies may review, rescind, or vary an order made by it in the exercise of that jurisdiction'.

There is no rule of practice or statutory provision in this country which is equivalent to the U.K. r. 7.47(1) of the Insolvency Rules 1986) and in Australia: see s. 243(l) of the Companies Act 1961, s. 383 of the Companies Act 1981 and s. 482 of the Corporation's Act 1989.

The proper course is to stay proceedings under the winding-up order, and not to discharge it (*Re Baxters, Ltd.* [1898] WN 60): *Palmer's Company Precedents* (17th Ed.) Part II, Winding -Up, at p. 96. It is the practice not to rescind the winding-up order, but to stay proceedings under it (*Re Baxters* [1898] WN 60): *Supreme Court Practice* (1993) Vol. 2, para. 5220 at p. 1618. See also *Atkin's Court Forms* (2nd Ed.), (1992 issue), Vol. 10 p. 46, and at p. 386 Forms 111, 112 for the application and order.

Once a winding-up order has been made, "Its descent into dissolution will be prevented only in the unusual event of the Court ordering either an indefinite stay of the winding-up proceedings or termination of the winding-up. The Court has inherent jurisdiction to grant a stay: *Brinds Ltd v. Offshore Oil NL* (No.2) [1985] 10 ACLR 242. Statutory jurisdiction to grant a stay or terminate is conferred by s. 383 [Companies Act 1981] /s. 482 [Corporations Act 1989]": *Ford, Principles of Company Law*, 5th Ed. (1990), [2207] at p. 770.

A winding-up order could not be discharged or rescinded after it had been made. The only remedy is to apply for a stay of proceedings under the winding-up order: see s. 243(l) of the Companies Act 1965.

The effect of an order to stay proceedings under the winding-up order altogether after a winding-up order has been made is a total discontinuance or termination of the winding up proceedings. In *Jowitt's Dictionary of English Law*, (2nd Ed.), Vol.2, under Stay at pp. 1701, 1702, after stating that the term "stay of proceedings" can mean a total discontinuance of an action, it says this:

> ... but in strictness it is only accurate when a decree or judgment has been given, for in such a case the suit or action cannot be dismissed, because the Court has adjudicated on it, and therefore all that can be done is to stay proceedings under the decree or judgment.

The appellant has appealed against the order of 22 March 1994 which has stayed all further proceedings under the winding-up order and which effectually has totally discontinued or terminated the winding-up proceedings. That appeal is now pending in the Federal Court.

On 4 April 1994, the Supreme Court (as it was called then) granted an interim stay of the order of the High Court dated 22 March 1994 and on 3 May 1994, that Court granted a further stay of the said order dated 22 March 1994 pending appeal to the Federal Court (as it is called now).

What then is the effect of the stay order of the then Supreme Court on the order of the High Court dated 22 March 1994? It has the effect of suspending or staying the operation of the High Court order of 22 March 1994.

The stay of operation of an order means that the order which has been stayed would not be operative from the date of the passing of the stay order. It does not mean that the said order has been wiped out from existence: see *Shree Chamundi Mopeds Ltd. v. Church of South India Trust Assn.* [1992] 3 SCC 1, 9; AIR 1992 SC 1439, and *Supreme Court on Words and Phrases* [1993], at p.659. Therefore the effect of the order of the then Supreme Court ordering a stay of the order of the High Court dated 22 March 1994 is that the order of the High Court of 22 March 1994 would not be operative from the date of the passing of the stay order of the then Supreme Court. It does not mean that the order of the High Court dated 22 March 1994 staying all further proceedings under the winding-up order dated 5 September 1989 has been wiped out from existence. The order of the High Court dated 22 March 1994 ordering an indefinite or permanent stay of the winding up-proceedings is still in existence although, for the time being, inoperative or suspended until the appeal is heard by the Federal Court when it can either be set aside or affirmed.

Despite the order of 22 March 1994 which still exists, the Judge on 29 June 1994 entertained and heard an application by the first, second and third respondents to set aside an earlier order dated 24 January 1994 (and another order dated 7 January 1991 but that was withdrawn at the hearing) which had been obtained by the appellant in the winding-up Court, and for other reliefs. The Judge allowed the application. Against this order dated 29 June 1994, the appellant has appealed to this Court.

It is because the order dated 22 March 1994 still exists that the Judge ought not to have heard the application or to have made any order on it after that date in proceedings under the winding-up order.

For the reasons stated above, we have allowed the appeal and set aside the order dated 29 June 1994.

If it were otherwise, so that the order dated 29 June 1994 were allowed to remain undisturbed and the order dated 22 March 1994 was affirmed by the Federal Court on appeal, it would have made the decision of the Federal Court nugatory as well as made nonsense of the order of the High Court dated 22 March 1994. This is because by affirming the order dated 22 March 1994, the winding-up order and all proceedings under it would have been totally discontinued, and that would have made it impossible for the order dated 29 June 1994 to have been made under the discontinued proceedings.